

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
January 12, 2010 Session

**STATE OF TENNESSEE v. VICTOR WAYNE BROWNING**

**Appeal from the Circuit Court for Robertson County**  
**No. 08-0223      Michael R. Jones, Judge**

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**No. M2009-00509-CCA-R3-CD - Filed March 12, 2010**

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Following a bench trial, the Defendant, Victor Wayne Browning, was found guilty of assault, a Class A misdemeanor. See Tenn. Code Ann. § 39-13-101. He received a sentence of eleven months and twenty-nine days. The trial court ordered him to serve thirty days of his sentence in the Robertson County Jail, with the sentence thereafter to be suspended and the Defendant placed on supervised probation. In this direct appeal, the Defendant (1) challenges the sufficiency of the convicting evidence; (2) asserts that a sentence of thirty days confinement was improper; and (3) argues that the proof did not sufficiently establish the amount of restitution awarded and, furthermore, that the trial court did not consider the Defendant's financial resources or ability to pay as required by statute. After a review of the record, we conclude that the evidence is sufficient and that the trial court did not err in ordering the Defendant to serve thirty days in confinement. With regard to the order of restitution, we conclude that, while the amount of restitution ordered was properly established, remand is necessary for a determination of the Defendant's financial resources and his future ability to pay.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part; Remanded**

DAVID H. WELLES, J., delivered the opinion of the Court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Glen R. Funk, Nashville, Tennessee, for the appellant, Victor Wayne Browning.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany Faughn, Assistant Attorney General; John W. Carney, District Attorney General; and Dent Morriss, Assistant District Attorney General, for the appellee, State of Tennessee.

## **OPINION**

### **Factual Background**

On April 16, 2008, a Robertson County grand jury charged the Defendant with aggravated assault. See Tenn. Code Ann. § 39-13-102. Following the Defendant's waiver of his right to a trial by jury, a bench trial was held on January 14, 2009.

Donna Saunders, the victim, testified that, approximately two and half to three years before trial, she met the Defendant and that they began dating for a period of about ten months. At this time, the victim had two children, and she was married to their father (to whom she was still married at trial). She relayed that her relationship with the Defendant had been a troubled one, both parties coming into court on various occasions for alleged criminal behavior toward the other. In February 2008, she herself was placed on diversion for misdemeanor vandalism and public intoxication for an incident that occurred when she attempted to retrieve some property from the Defendant's residence.

According to the victim, the Defendant worked as an electrician, however, he had only been employed a total of five weeks since she had known him. The Defendant lived in a house on his mother's property, and he and his son were supported by his mother.

On April 22, 2007, the victim and the Defendant went to an afternoon Nashville Sounds baseball game and, after the game, they stopped by Bailey's Sport Bar and Grille in Goodlettsville. She believed the Defendant drank at the game, having four or five mixed drinks. The victim stated that, at the sports bar, the Defendant had more mixed drinks and she had a glass of wine. They returned home to the Defendant's residence around 9:00 p.m.

The victim told the Defendant that she had to leave to go pick up her children and get them ready for school the following day. The Defendant was "offended" by this, and "he just flipped out and just started beating [her]." The Defendant wanted the victim to go inside the house, but she refused. She jumped into the driver's side of her van and was trying to slam the door shut and lock it, but she was not fast enough to hold off the Defendant. She then moved to the passenger's side of the vehicle and tried to push the Defendant off of her by using her legs. The Defendant took the victim's keys and threw them into woods. He also took her cell phone and broke it in two.

According to the victim, the violence then stopped for a few minutes, and they looked for the keys. A couple of times she tried to run. Things then escalated, and the Defendant picked up the victim and turned her upside down, slamming her head on the ground four different times, causing her to lose consciousness twice. At some point, the Defendant

slammed the victim's head into the hood of the van, and he ripped off the side-view mirrors of the van. Also during the episode, the victim went inside the house looking for a gun, but she was unable to find one. She grabbed a rake instead. When she returned with the rake, the Defendant quickly overpowered her and grabbed the rake, hitting her with it.

The Defendant knocked the victim to the ground and stood over her with an industrial size flashlight. He threatened to hit her in the head with hit, so she finally agreed to go inside.

The victim testified that the Defendant's mother witnessed some of the beating, as she was helping in the search for the keys; at one point, the Defendant's mother checked the victim's pulse and stated, "[M]y God, . . . this time you have killed her." According to the victim, this entire episode lasted a total of three hours. No one ever called for an ambulance or the police.

Once inside the house, the Defendant hit the victim a few times and then lay down on the couch. The victim thought her arm was broken. She lay down on the bed and waited for the Defendant to fall asleep. Around 3:00 a.m., she found the Defendant's cell phone, but she was so afraid he would hear her and wake up that she did not call for help. The Defendant awoke around 6:00 that morning, and they both went outside to look for the victim's keys. According to the victim, the Defendant "walked straight to them[,] knowing exactly where they were located. The victim was then able to drive away; however, the Defendant told her that he would kill her if she ever talked to the police.

The victim stated that, in addition to her arm, she had injuries to her head, face, and neck. She relayed that her arm was her "biggest concern." After leaving the Defendant's house, she went home and called the women who were caring for her sons to let them know why she had not shown up the night before to get them. The victim then took a shower and proceeded to the emergency room. The victim provided seventeen photographs at trial, purportedly taken by her friend Tammy on the morning of April 23, just following the beating and prior to her visit to the hospital. The photos showed that the victim had redness and swelling around her mouth, swelling around her left eye, and additional bruising and injuries to her knees. She stated that those photographs accurately reflected her injuries on that morning, and they were admitted into evidence. When asked about when the pictures were given to the State, the victim said that she had only given them to the prosecutor two or three months before trial because, at first, she did not "remember them being taken . . ."

As a result of the beating, she suffered a concussion and experienced dizziness, nausea, and headaches. She was encouraged to see a physician after her treatment at the

hospital. She was released that same morning. The victim's medical records from her emergency room visit were admitted into evidence.

Additionally, the victim acknowledged that she repeatedly sent text messages to the Defendant after this incident (from June 2007 through January 2008). She claimed that the Defendant followed her to a restaurant on May 5, where he came inside and cried, stating he would get help. He came over the next day to fix a light fixture, but "flipped out again," so she ordered him out of her house. According to the victim, the Defendant contacted her twice on December 5, wanting to discuss the case. The Defendant told her she "would end up dead" if she showed up to testify at trial. The Defendant would still show up at her house and tell her that he loved her. The victim insisted that the text messages were simply to make the Defendant believe she was going to help him in court because she was afraid of what he would do otherwise.

Dr. John Bates, a family practice physician, testified that he treated the victim in May 2007 following her visit to the emergency room. According to Dr. Bates, the victim complained of some dizziness and nausea and reported head trauma from a beating by "some person." Dr. Bates saw her twice; her CT scan results were normal, but the MRI revealed some fluid in the right petrous pyramid. Fluid in that place was consistent with the victim's report of head trauma from a beating. He explained that the victim's symptoms of continued headache, nausea, and dizziness were also consistent with head trauma. Dr. Bates testified that the head trauma "with additional—bleeding, potentially could" result in a "serious chance of death[.]" Dr. Bates confirmed that he was not responsible for taking the photos brought by the victim.

The State rested, and the Defendant moved for a judgment of acquittal. The trial court granted the motion, in part, concluding that the State had failed to prove the element of serious bodily injury required for an aggravated assault. Trial proceeded on the lesser-included offense of simple assault.

The Defendant then called Amy Armstrong in his defense. Ms. Armstrong had been dating the Defendant exclusively since May 31, 2007. She testified that she had access to the Defendant's phone and that she had accurately transcribed the text messages from the victim. Ms. Armstrong claimed that the victim contacted her on August 29, 2008, and stated that the Defendant was going to jail "no matter what." Ms. Armstrong hung up the telephone. When asked about contact with the victim since the incident, Ms. Armstrong testified that the victim would drive through the parking lot where Ms. Armstrong worked looking for the Defendant's vehicle and, on at least one occasion, she came inside the establishment.

The Defendant then testified. He recounted a much different version of events from that of the victim. Most importantly, he denied ever hitting the victim and claimed that, on the evening of April 22, she fell down the stairs because she was intoxicated, which resulted in the injuries she complained of.

Following the conclusion of proof, the trial judge found the Defendant guilty of simple assault, a Class A misdemeanor. See Tenn. Code Ann. § 39-13-101. A sentencing hearing was held on February 20, 2009. For his conviction, the trial court sentenced the Defendant to eleven months and twenty-nine days. His sentence was to be suspended following service of thirty days in the county jail, and the Defendant was to be placed on supervised probation. The trial court also ordered restitution in the amount of \$4,442.70.

The Defendant filed a motion for new trial, which was denied. The case is now before this Court for our review.

### **I. Sufficiency**

The Defendant challenges the sufficiency of the evidence convicting him of assault. Tennessee Rule of Appellate Procedure 13(e) prescribes that “[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.” A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant’s challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State’s witnesses and resolves all conflicts in the evidence in favor of the prosecution’s theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor

will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

Assault is defined as the intentional, knowing, or reckless causing of bodily injury to another. Tenn. Code Ann. § 39-13-101(a)(1). The Defendant's argument is essentially that the unreliable victim's testimony was not sufficiently corroborated.

In the light most favorable to the State, the evidence showed that the Defendant repeatedly beat the victim over a three-hour period on August 22, 2007. The victim testified that, after returning home from their outing, she told the Defendant she was leaving in order to care for her children, but he became enraged. He took her keys and threw them into the woods and broke her cell phone into two pieces. He then picked up the victim and turned her upside down, slamming her head on the ground four different times. She stated that she lost consciousness twice. At some point, the Defendant slammed the victim's head into the hood of her van, ripped off the side-view mirrors of the van, and hit the victim with a rake. The trial judge found the victim to be credible; making credibility determinations of witnesses was the trier of fact's task, and we do not disturb credibility determinations on appeal.

The victim testified that she visited the emergency room on the morning of April 23. At that time, she reported that she had been assaulted, and it was determined that she suffered a concussion. The medical records showed that she had multiple contusions and that her left arm and right leg were tender. She also experienced nausea, dizziness, and headaches after the incident. Dr. Bates reviewed the MRI scans taken at the hospital that morning and found that there was fluid in the right petrous area. He testified that fluid on the victim's brain was consistent with her report of head trauma and a beating. Dr. Bates' testimony and the medical records are sufficient corroboration that an assault occurred. Moreover, generally, a conviction may rest upon the uncorroborated testimony of a single witness. See State v. Wyrick, 62 S.W.3d 751, 767 (Tenn. Crim. App. 2001). We conclude, therefore, that the evidence was sufficient to sustain the Defendant's conviction for assault.

## **II. Sentencing**

### **A. Full Probation**

The Defendant argues that the trial court erred by ordering him to serve thirty days of his sentence in confinement, asserting, instead, that his sentence should be suspended "in full." Specifically, he argues that the trial court did not consider the proper sentencing principles in imposing some confinement.

Misdemeanor sentencing is controlled by Tennessee Code Annotated section 40-35-302, which provides in part that the trial court shall impose a specific sentence consistent

with the purposes and principles of the 1989 Criminal Sentencing Reform Act. See Tenn. Code Ann. § 40-35-302(b). Misdemeanor sentencing is designed to provide the trial court with continuing jurisdiction and a great deal of flexibility. See State v. Troutman, 979 S.W.2d 271, 273 (Tenn. 1998); State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997).

In misdemeanor sentencing, a separate sentencing hearing is not mandatory, but the court is required to provide the parties with a reasonable opportunity to be heard as to the length and manner of service of the sentence. See Tenn. Code Ann. § 40-35-302(a). The trial court retains the authority to place the defendant on probation either immediately or after a time of periodic or continuous confinement. See Tenn. Code Ann. § 40-35-302(e).

Our Supreme Court has observed that, “[i]n addition to the statutory considerations for issuing sentences of confinement, the misdemeanor sentencing statute merely requires a trial judge to consider enhancement and mitigating factors when calculating the percentage of a misdemeanor sentence to be served in confinement.” Troutman, 979 S.W.2d at 274. This Court has stated:

In felony sentencing, the trial court has an affirmative duty to state in the record, either orally or in writing, which enhancement and mitigating factors it found and its findings of fact. Tenn. Code Ann. § 40-35-209(c) (1997); Tenn. Code Ann. § 40-35-210(f) (Supp.1998); Troutman, 979 S.W.2d 271, 274 (Tenn. 1998). In contrast, the misdemeanor sentencing statute only requires that the trial court consider the enhancement and mitigating factors when calculating the percentage of the sentence to be served in actual confinement” prior to “consideration for work release, furlough, trusty status and related rehabilitative programs.” Tenn. Code Ann. §§ 40-35-302(d) (1997); Troutman, 979 S.W.2d at 274.

State v. Russell, 10 S.W.3d 270, 278 (Tenn. Crim. App.1999).

We also note that the statutory enhancement factors are now advisory only and not binding on the trial court. See State v. Carter, 254 S.W.3d 335, 343-44 (Tenn. 2008). Here, in imposing thirty days of confinement, the trial court found as follows:

[I]n sentencing on a misdemeanor, I’m sitting here looking at page four of the presentence report. We start with December seven 2006, ended up with a reckless endangerment conviction; two 19 `07 was a public intoxication; four seven `07 a DUI; then we come to April the 22nd `07, which is this case, is an assault; then we go to May 30th `07 another DUI. So we have at least three

alcohol related events without even thinking about this one; this one was also . . . definitely alcohol related.

The trial court clearly sentenced the Defendant with due consideration to the principles of the 1989 Criminal Reform Sentencing Act. As previously stated, in misdemeanor sentencing, the trial court need not articulate in the record which enhancement and mitigating factors it finds applicable; rather, it need only consider them. The trial court indicated that the Defendant displayed a disturbing alcohol-related criminal history and that this incident was also alcohol-related. These factors fully justify the trial court's decision to order the Defendant to serve thirty days in confinement rather than sentencing him to full probation. Further, we conclude that the lack of other findings is no basis for holding the trial court in error. See Russell, 10 S.W.3d at 278. The Defendant has failed to establish that his sentence constituted an abuse of the trial court's substantial discretion in sentencing him for his misdemeanor conviction, and the Defendant is not entitled to relief on this issue.

### **B. Restitution**

The Defendant also challenges the trial court's order regarding the payment of restitution, arguing both that the proof was insufficient to show that the victim suffered a total loss of \$4,442.70 and that, even if proven, the trial court failed to consider the financial resources and future ability of the Defendant to pay the restitution amount, findings required by Tennessee Code Annotated section 40-35-304(d). The State submits that the record supports the restitution award, but concedes that the trial court did not make the required statutory findings. The State thus agrees that this case must be remanded for further findings.

The record reflects that the restitution amount of \$ 4,442.70 was based upon testimony from the victim at the sentencing hearing. The victim testified that she had uncompensated medical bills in the amount of \$3,934.02. When asked if she had documentation, the victim stated that she had "all [her] insurance things" with her. The victim also stated that she was requesting compensation for property damage in the amount of \$508.68, for a lost cell phone and prescription sunglasses and for automobile damages. She elaborated on the damage to her van: it occurred when the Defendant "ripped off both side mirrors." She also stated that she had the receipt for replacing the mirrors.

When a defendant challenges the validity and amount of restitution, this Court must conduct a de novo review of both the amount of restitution ordered and the method by which it was determined. State v. Johnson, 968 S.W.2d 883, 884 (Tenn. Crim. App. 1997) (citing Tenn. Code Ann. § 40-35-401(d) (1990); State v. Frank Stewart, No. 01-C-019007CC00161, 1991 WL 8520, at \*1 (Tenn. Crim. App., Nashville, Jan. 31, 1991)). The trial court is entitled to a presumption of correctness. Tenn. Code Ann. § 40-35-401(d).



A trial court, in conjunction with a probated sentence, may order a defendant to make restitution to the victims of the offense. See Tenn. Code Ann. § -304(a). “The purpose of restitution is not only to compensate the victim but also to punish and rehabilitate the guilty.” Johnson, 968 S.W.2d at 885. The statute that governs restitution as a condition of probation provides, in pertinent part, as follows:

(b) Whenever the court believes that restitution may be proper or the victim of the offense or the district attorney general requests, the court shall order the presentence service officer to include in the presentence report<sup>1</sup> documentation regarding the nature and amount of the victim’s pecuniary loss.

(c) The court shall specify at the time of the sentencing hearing the amount and time of payment or other restitution to the victim and may permit payment or performance in installments. The court may not establish a payment or performance schedule extending beyond the statutory maximum term of probation supervision that could have been imposed for the offense.

(d) In determining the amount and method of payment or other restitution, the court shall consider the financial resources and future ability of the defendant to pay or perform.

(e) For the purposes of this section, “pecuniary loss” means:

(1) All special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the defendant; and

(2) Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense; provided, that payment of special prosecutors shall not be considered an out-of-pocket expense.

Tenn. Code Ann. § 40-35-304(b)-(e).

Special damages are those which are “the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence.” State v. Lewis, 917 S.W.2d 251, 255 (Tenn. Crim. App. 1995) (quoting Black’s Law Dictionary 392 (6th ed. 1990)). General damages are those which are “the necessary and immediate consequence of the wrong.” Id. (quoting Webster’s New International Dictionary

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<sup>1</sup> It appears that a partial presentence report was ordered in this case.

664 (2d ed. 1957)). It is unnecessary for the sentencing court to determine restitution in accordance with the strict rules of damages applied in civil cases. Johnson, 968 S.W.2d at 887.

The sum of restitution ordered must be reasonable and does not have to equal the precise pecuniary loss. State v. Smith, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994). There is no set formula. Johnson, 968 S.W.2d at 886. The sentencing court must consider not only the victim's loss but also the financial resources and future ability of the defendant to pay. Tenn. Code Ann. § 40-35-304(d); State v. Bottoms, 87 S.W.3d 95, 108 (Tenn. Crim. App. 2001). In ordering restitution, the trial court shall specify the amount of time and payment and may permit payment or performance of restitution in installments. Tenn. Code Ann. § 40-35-304(c). The court may not, however, establish a payment or schedule extending beyond the expiration of the sentence. Tenn. Code Ann. § 40-35-304(g)(2). If the defendant, victim, or district attorney petitions the trial court, it may hold a hearing and, if appropriate, waive, adjust, or modify its order regarding restitution. Tenn. Code Ann. § 40-35-304(f). Further, any unpaid portion of the restitution may be converted to a civil judgment. Tenn. Code Ann. § 40-35-304(h)(1); Bottoms, 87 S.W.3d at 108.

On appeal, the Defendant argues that the evidence presented was insufficient to establish the amount of victim's loss and that the trial court did not make the findings required by Tennessee Code Annotated section 40-35-304(d). First with regard to the amount of the victim's loss, our Court has noted that a victim seeking restitution must present sufficient evidence to allow the trial court to make a reasonable, reliable determination as to the amount of the victim's losses. Bottoms, 87 S.W.3d at 108.

General statements by a victim regarding the amount of his or her loss containing no explanation as to how the victim arrived at the amount are insufficient. While a victim's testimony standing alone may be sufficient to establish special damages for the purposes of restitution, the victim should explain how he or she arrived at the amount of damages requested. Further, documentation supporting the victim's testimony is helpful.

State v. Jerry Lee Truette, No. M2005-00927-CCA-R3-CD, 2006 WL 2000540, at \*3 (Tenn. Crim. App., Nashville, July 19, 2006) (quoting State v. Charles R. Turner, No. M2003-02064-CCA-R3-CD, 2004 WL 2775485, at \*8 (Tenn. Crim. App., Nashville, Dec. 1, 2004)). At the sentencing hearing, the victim testified to the amount of her uncompensated medical bills and property damage. She explained how she arrived at the property damage figure. While no documentation was actually admitted into evidence, the victim stated that she had with her at the hearing insurance papers showing her medical expenses and receipts for repairing her automobile's side mirrors. We agree that admission of these documents

would have been helpful; nonetheless, we conclude that this testimony is sufficient to establish the victim's pecuniary loss.

The Defendant also contends that restitution should not be allowed because the victim's medical bills were covered by insurance and, therefore, she has already been compensated. He makes this allegation based upon the victim's testimony that she had "all [her] insurance things" with her. "The victim in the case is the person who incurred the losses as [she] is personally responsible for the medical bills incurred as a result of this assault. Thus, [she] is the proper person to receive that restitution. It is [her] responsibility to see that the medical bills are paid; that is not a matter for the court's direction." See State v. Steven Watson, No. W2008-00452-CA-R3-CD, 2009 WL 2407752, at \*13 (Tenn. Crim. App., Jackson, Aug. 6, 2009). It will be the victim's responsibility to forward the restitution received to the proper parties, if necessary; such is not a matter for this Court.

However, we agree with the Defendant that the trial court did not consider the Defendant's financial resources and his future ability to pay or preform as required by statute. See Tenn. Code Ann. § 40-35-304(d). The record established that the Defendant worked sporadically as electrician (for five weeks at most), but no mention was made of his earnings. He was also said to reside with and be financially supported by his mother. We remand the restitution award for additional determinations concerning the Defendant's financial resources and future ability to pay.

### **Conclusion**

Based upon the foregoing reasoning and authorities, the judgment of conviction and sentence imposed, with respect to length and manner of service, are affirmed. However, with regard to the order of restitution, the case is remanded for a determination of the Defendant's financial resources and future ability to pay.

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DAVID H. WELLES, JUDGE